

In the Matter of Winifred Allen,
Department of Human Services
DOP Docket No. 2006-780
(Merit System Board, decided May 24, 2006)

Winifred Allen, a Technical Assistant 3 with Ancora Psychiatric Hospital, Department of Human Services (DHS), petitions the Merit System Board (Board) for enforcement of the attached settlement agreement acknowledged by the Board at its meeting on October 22, 2003.

By way of background, on February 15, 2001, the petitioner was issued a Final Notice of Disciplinary Action (FNDA) removing her from her position as a Medical Records Technician with the Arthur Brisbane Child Treatment Center, DHS, effective July 1, 2000, on the basis that she was absent from work without authorization for more than five consecutive days since July 1, 2000. Upon the petitioner's appeal to the Board, the matter was transmitted to the Office of Administrative Law (OAL) for a hearing as a contested case. During the pendency of the proceedings, it came to light that the petitioner filed a discrimination complaint with the Division of Civil Rights (DCR). That matter was transmitted to OAL and consolidated with the petitioner's removal proceedings.¹ Prior to the hearing, DHS filed a motion for summary decision, and the petitioner filed a cross motion. The motions were denied and a plenary hearing was scheduled for August 18, 2003. However, the parties entered into a settlement on that date. Administrative Law Judge Ana C. Viscomi (ALJ) presided over the settlement, which provided in part for the:

1. Withdrawal of the FNDA by the appointing authority;
 2. Dismissal of claims filed by the petitioner at DCR and EEOC;
 3. Back pay to the petitioner in the amount of \$20,000;
 4. Compensatory damages to the petitioner in the amount of \$30,000;
 5. Attorney fees in the amount of \$30,000;
 6. A leave of absence with pay from April 18, 2000² to the date of the
 7. petitioner's reinstatement;
 8. A voluntary demotion to the position of Technical Assistant 3 and a salary of \$38,579.53. The petitioner was to receive salary increases "consistent with Department of Personnel [DOP] Regulations as if this were a red circle action
9. Reemployment rights to the petitioner to her former title of Medical Records Technician with the right to accept the first available position and to be

¹ The petitioner also filed a claim with the Equal Employment Opportunity Commission (EEOC).

² It is noted that the petitioner was actually absent from work since April 2000. She was pregnant at the time and issues arose concerning whether she was able to work or merely restricted from performing certain physical activities.

placed at a step consistent with her original date of employment as a Medical Records Technician.

10. The petitioner's receipt of "all her perquisites of employment . . . as if she had been continuously employed by the State of New Jersey based upon her anniversary date of original date of employment on June 16, 1997."

The ALJ reviewed the record and the terms of the settlement and found that the parties voluntarily agreed to the settlement. The ALJ noted that the petitioner testified on the record as to her assent to the settlement agreement. The petitioner had been represented by Renee Vidal, Esq. The Board acknowledged the settlement at its meeting on October 22, 2003. It is noted that DOP records reveal that the petitioner was reinstated at DHS provisionally pending a qualifying examination (PAQ) as a Technical Assistant 3 with Ancora Psychiatric Hospital (Ancora), effective March 6, 2004. For reasons not clear from the record, the petitioner's status has not yet been adjusted to reflect a permanent appointment, as she remains PAQ in the title. However, a "Qualifying Examination" requires a candidate to demonstrate that he or she possesses the necessary requirements for a particular title in order to effect a lateral or promotional transfer to the title with permanent status. The requirements for the title of Technical Assistant 3 are two years of experience in reviewing, verifying, authorizing, and/or providing information and assistance of a technical or fiscal nature in a public or private organization. Applicants who do not possess the required experience may substitute semester hour credits from an accredited college or university on a year-for-year basis with 30 semester hour credits being equal to one year of experience. DOP records show that the petitioner was appointed as a Medical Records Technician on an interim basis on June 16, 1997 and then appointed provisionally pending open competitive examination procedures, effective January 2, 1999. She received a regular appointment to the title effective June 1, 1999. The job specification for Medical Records Technician states that an employee codes, indexes and files medical records, abstracts data for case summaries, and maintains files in current condition. However, a review of the petitioner's application for employment with DHS reflects that she possesses an Associate's degree in Health Information Technology and a total of 67 college credits. Therefore, per the substitution clause for experience, the petitioner meets the requirements for the title of Technical Assistant 3.

In her request, the petitioner asserts that she has not received all of the sick and vacation days due her despite repeated requests to the Ancora staff. It is noted that the petitioner does not indicate how much time is lacking from her leave balances. Further, although the petitioner states that she had legal representation, she maintains that she did not understand that "red circle" meant that her salary would be frozen. The petitioner indicates that she has also not received her across-the-board pay increases in 2004 or 2005. She was told that she would be returning

to her range 16 salary, but did not understand the consequences of the red circle action and was misled. She states that her attorney never explained what it meant. Moreover, the petitioner asserts that she has not received all of her “retroactive health benefits as agreed.” Additionally, the petitioner claims that since 2003, there has been no effort by DHS to return her to a Medical Records Technician position (range 16) despite two positions becoming available at Trenton Psychiatric Hospital. She contends that one position is held by an outside contractor and the other position became vacant when the employee serving in the title passed away. Moreover, the petitioner claims that she has more seniority than the two individuals currently serving in the title of Medical Records Technician at Ancora. Thus, the petitioner maintains that she should have been returned to her former title. Further, she indicates that on or about March or April 2005, she discovered that she had not been placed on a regular reemployment list for Medical Records Technician as indicated in the settlement, but eventually was placed on the list effective April 27, 2005 after she made many calls. In this regard, in a letter dated May 2, 2005, the DOP advised the petitioner that in accordance with the Board’s decision, she was placed on the regular reemployment list for Medical Records Technician and will be certified, unless she otherwise advises, for vacancies in the title to State agencies located in Atlantic, Burlington, Camden, Monmouth, Mercer, and Ocean Counties. DOP noted that the list does not expire until 2030.³

Moreover, the petitioner complains about her current position. She alleges that Donna Ingram, a Manager 3, Human Resources, advised her that it “was not working out” and that she would be reassigned. In a memorandum dated August 17, 2005 to the petitioner, Ingram indicated that due to the hospital’s operational needs, the petitioner was to be reassigned to the Food Service Office, effective August 22, 2005. In response, the petitioner stated to Ingram that she did not know anything about food service. However, Ingram supposedly said that there was no other position available for the petitioner in the hospital and a clerk was needed in the other department to do data entry.

In response, DHS, represented by Sonia M. Frontera, DAG, indicates that the petitioner was reimbursed her leave time. In this regard, it states that the petitioner was informed by Ancora that she was credited with 354.3 hours of sick time and 111.8 hours of vacation time upon her return to employment. It is noted that Arthur Brisbane verified that as of April 18, 2000, the petitioner had 13 hours of unused sick leave and 61 hours of unused vacation leave. Therefore, DHS maintains that it has complied with the settlement agreement. Moreover, as to the petitioner’s claim of the lack of understanding of a red circle action, DHS maintains that the petitioner was represented by an attorney and certified in the agreement that she fully understood the terms. Thus, it asserts that enforcement of this part of the agreement is appropriate in spite of the petitioner’s protestations. As to a Medical Records Technician position, DHS states that it requested that the DOP

³ It is noted that no special reemployment list or promotional eligible list exists at this time.

place the petitioner at the top of the reemployment list for Medical Records Technician. However, it indicates that due to an unintentional oversight by the DOP, the petitioner was not placed on the list until April 27, 2005. DHS indicates that it was informed by the Division of Human Resource Information Services, DOP, that no appointments have been made since the Board acknowledged the settlement. Further, although a vacancy existed at Ann Klein Forensic Hospital in June 2004, no appointment was made. Further, Medical Records Technicians at Ann Klein Forensic Hospital are located in Hudson and Middlesex Counties, for which the petitioner is not scheduled to be certified. Regarding a position at Trenton Psychiatric Hospital, DHS asserts that there have not been any vacancies since the Board's acknowledgement of the settlement. It states that the position previously occupied by the deceased employee was filled by a contractor as a cost saving measure. It is noted that DOP records show that the employee passed away on October 31, 2003.

Regarding the petitioner's claim for retroactive health benefits, DHS indicates that the Health Benefits Bureau initially determined that the petitioner was not entitled to benefits. However, the bureau has reconsidered and is diligently working with the petitioner and the insurance providers to process reimbursement of eligible claims. As to the petitioner's reassignment, the personnel department at Ancora advised that the petitioner expressed difficulty working with her supervisor. A data entry position became available in the Food Service Office, and therefore, due to operational needs, DHS indicates that the petitioner was reassigned. However, her title, salary, hours, and days off were not changed. It is noted that the petitioner filed a grievance regarding her reassignment, which was denied. She has pursued the issue with the Public Employment Relations Commission (PERC). Lastly, DHS states that it has no objection to the full implementation of the terms of the settlement agreement and looks forward to the amicable resolution of any outstanding issues.

It is noted that DOP records show that there are four employees at DHS currently serving in the title of Medical Records Technician. Jaman Dalsania and Carol Meyers were permanently appointed to the title on December 15, 1999 and work at Ancora. Pauline Scotto was permanently appointed to the title on August 2, 2001 and works at New Lisbon Developmental Center. Mattie Levine was provisionally appointed to the title on November 18, 2002 and permanently appointed to the title on April 21, 2003 and works at Trenton Psychiatric Hospital. Moreover, it is noted that the petitioner filed a complaint with DCR alleging that Ancora and the DHS retaliated against her for having filed previous claims with DCR and the EEOC. Specifically, she claimed that she was retaliated against in that she was denied a promotion as a Medical Records Technician and that the position was given to Levine who was less qualified. Further, the petitioner alleged that Ancora retaliated against her by failing to comply with the settlement agreement. The DCR matter is still pending.

CONCLUSION

The Board acknowledges settlement agreements to allow for the resolution of matters properly before it. The Board also reviews settlement agreements to ensure compliance with Merit System law and rules. If a term of the agreement is later violated by either party, the Board has jurisdiction to enforce the term. *See e.g., In the Matter of Donald Hickerson* (MSB, decided September 10, 2002). *See also In the Matter of Police Officer and Superior Officer, Essex County* (1991 Layoffs), Docket No. A-5755-94T5 (App. Div. April 22, 1996).

In the instant matter, the petitioner was removed from employment effective July 1, 2000 and appealed her removal to the Board. The matter was transmitted to the OAL for a hearing. However, the parties engaged in settlement negotiations and entered into an agreement, which was acknowledged by the Board on October 22, 2003. The settlement agreement provided for the petitioner's reinstatement, which was effective March 6, 2004. The agreement also provided the petitioner with "all her perquisites of employment . . . as if she had been continuously employed by the State of New Jersey based upon her anniversary date of original date of employment on June 16, 1997." The petitioner indicates that she has not been credited with all of her sick and vacation days due her, nor has she received all of her retroactive health benefits. As to her sick leave, the petitioner is entitled to any unused sick days since sick leave can accumulate from year to year without limit. *See N.J.S.A. 11A:6-5 and N.J.A.C. 4A:6-1.3(f)*; *See also, In the Matter of John Raube, Senior Correction Officer, Department of Corrections*, Docket No. A-2208-02T1 (App. Div. March 30, 2004). Thus, the petitioner should receive her unused sick leave from 2000 and 15 days per year for 2001, 2002, 2003, and 2004. It is noted that full-time State employees in the career service are credited with 15 sick days per year. *See N.J.A.C. 4A:6-1.3(a)2*. Further, employees in the Medical Records Technician and Technical Assistant 3 titles work 35 hours per week. Therefore, for 2001 to 2004, the petitioner is entitled to 420 hours of sick leave plus any unused sick days from 2000. The record indicates that the petitioner had a balance of 13 hours of sick leave as of April 18, 2000. Accordingly, upon her reinstatement on March 6, 2004, the petitioner's sick leave balance should have been 433 hours. It is noted that the settlement provides for the petitioner's leave of absence with pay from April 18, 2000 through March 5, 2004. It does not indicate that sick or vacation leave is to be used to cover the petitioner's absence.

As to vacation leave, since the petitioner was reinstated in 2004, she is not due any vacation leave for 2000 to 2002 since vacation leave not taken in a given year can only be carried over to the following year. *See N.J.S.A. 11A:6-2(f) and N.J.A.C. 4A:6-1.2(f)*; *See also, In the Matter of Donald H. Nelsen, Jr.*, Docket No. A-2878-03T3 (App. Div. February 4, 2005); *In the Matter of John Raube, Senior Correction Officer, Department of Corrections, supra*. However, the petitioner is

entitled to vacation leave for 2003 and 2004. Full-time State employees in the career service with five to 12 years of continuous service are credited with 15 vacation days per year. See *N.J.A.C.* 4A:6-1.2(a)2ii. Therefore, upon her reinstatement, the petitioner's vacation balance should have been 210 hours (30 days x seven hours per day). The Board notes that DHS made a good faith attempt to adjust the petitioner's leave balances; however, it is unclear as to how Ancora calculated the balances, which do not amount to the figures calculated by the Board. The balances, however, may reflect what the petitioner used as of the date calculated.

Regarding the petitioner's health benefits, the Board's review is limited. *N.J.A.C.* 4A:2-2.10(d) only authorizes reimbursement of payments made to *maintain* health insurance coverage. Further, the entitlement does not apply to any medical expenses and/or prescription drug expenses incurred during the period of the petitioner's separation from employment from the appointing authority. See e.g., *In the Matter of Shannon Stoneham-Gaetano and Maria Ciufo* (MSB, decided April 24, 2001). Therefore, any issues regarding the petitioner's health insurance coverage must be addressed with the provider. Nevertheless, it appears from the record that the petitioner was granted retroactive coverage and her eligible claims are being processed.

Regarding the petitioner's objection to the red circle action, *N.J.A.C.* 4A:3-4.13 provides in part that:

If the employee's base salary is above the maximum step, the employee will be red circled, that is, remain at that salary until the maximum step of the range is increased to a level at or above the employee's base salary, at which time the employee's salary shall be moved to that maximum step of the range.

The petitioner agreed to take a voluntary demotion to a Technical Assistant 3 position. This title has a corresponding salary range of 12. DOP records demonstrate that, effective December 24, 2005, this range's maximum salary (step 9) is \$38,293.19. The petitioner agreed to a salary of \$38,579.53. Therefore, pursuant to regulation, she would not be entitled to additional compensation until the maximum step is increased. Additionally the petitioner was represented by an attorney in the matter and testified on the record as to her assent to the settlement agreement. Therefore, there is not a sufficient basis to strike this term from the agreement.

Regarding the petitioner's reassignment, *N.J.A.C.* 4A:4-7.2 states that a reassignment is the in-title movement of an employee to a new job function, shift, location or supervisor within the organizational unit. Reassignments shall be made at the discretion of the head of the organizational unit. Further, a reassignment shall not be utilized as part of a disciplinary action, except when disciplinary

procedures have been utilized. An employee may challenge the good faith of a reassignment and the burden of proof shall be on the employee. *See N.J.A.C. 4A:4-7.7*. Although there may have been an issue with the petitioner's working relationship with her supervisor, the record demonstrates that the petitioner was reassigned to the Food Service Office due to operational needs and not as part of a disciplinary action. Further, there is no evidence in the record showing that the appointing authority abused its discretion in effecting the reassignment. Therefore, the petitioner has not met her burden of proof in the matter and there is no basis to disturb her reassignment under these circumstances. The Board notes, however, that the petitioner has challenged her reassignment with PERC.

As to a position as a Medical Records Technician, the settlement agreement provides for regular reemployment rights to the petitioner to the title with the right to accept the first available position. Initially, the Board notes that the name of any employee shall not remain on a regular reemployment list for more than four years from the date of resignation. *See N.J.S.A. 11A:4-6 and N.J.A.C. 4A:4-3.3(a)2*. Therefore, the petitioner cannot remain on a regular reemployment list for more than four years. Since the petitioner's placement resulted from an agreement and there is no effective resignation date, it is appropriate for the petitioner to be placed on the regular reemployment list for four years from the time the Board acknowledged the settlement, *i.e.*, from October 22, 2003 to October 21, 2007. The petitioner's late placement on the regular reemployment list was in error and the date is to be disregarded.

Turning to the question of available positions, the appointing authority has the discretion not to fill a position, even though a vacancy exists. *See e.g., In the Matter of Deputy Fire Chief (PM3654F), Borough of Roselle* (MSB, decided March 23, 2005). In this case, there has not been a regular appointment since the Board's acknowledgement of the settlement. Levine's appointment has no bearing on the settlement agreement. Levine was provisionally appointed to the title on November 18, 2002 and permanently appointed to the title on April 21, 2003 and the settlement agreement was not acknowledged until October 22, 2003. Nonetheless, an employee serving in the title of Medical Records Technician passed away on October 31, 2003 and DHS indicates that the position was filled by an outside contractor. The settlement agreement clearly provides that the petitioner had the right to accept the first available position. DHS' filling of the position without first offering it to the petitioner violated the terms of the settlement agreement. Although DHS contends that the appointment was a cost saving measure, it did not privatize or outsource the duties of all of the employees serving in the title or proceed with layoff action. The Board notes that among the Medical Records Technicians employed by DHS, the petitioner does not have the least seniority.

Therefore, pursuant to the clear terms of the settlement agreement, DHS must offer the petitioner a position as a Medical Records Technician. The Board

notes that the opportunities in the title are infrequent. The last appointment to the title was in 2003 and only four individuals are employed as Medical Records Technicians by DHS. Accordingly, it is appropriate for the position held by the outside contractor to be given to the petitioner. DHS may retain the services of the outside contractor; however, if another position is not available, the services of the outside contractor must be terminated. Further, in order to make the petitioner whole, although a voluntary demotion was agreed upon, if the outside contractor was hired on or before the petitioner's reinstatement date, the petitioner should have been returned to work as a Medical Records Technician effective March 6, 2004. A voluntary demotion would not have been necessary. However, if the outside contractor was hired after the petitioner's actual date of reinstatement, she should be considered to have been demoted as of March 6, 2004 until the time the outside contractor was hired. She would then be appointed from the regular reemployment list for Medical Records Technician effective the date the outside contractor was hired.

Moreover, although the petitioner is entitled to a position, she is not entitled to differential back pay. In this regard, the petitioner has not demonstrated that DHS acted in bad faith or was motivated by an invidious reason in hiring the outside contractor. Bad faith is also not evident in the record considering the close timing of the settlement with the death of the employee and the petitioner's late placement on the regular reemployment list. *See N.J.A.C. 4A:2-1.5(b)*. *See also In the Matter of Patrick M. Tortorello, Jr.*, Docket No. A-4460-02T3 (App. Div. June 1, 2004); *In the Matter of Kathryn E. Clark*, Docket No. A-5448-93T2 (App. Div. April 28, 1995), *cert. denied*, 142 N.J. 457 (1995) and *In the Matter of Marveinia Kitchen*, Docket No. A-6402-91T1 (App. Div. February 7, 1994).

Additionally, if the petitioner chooses not to accept the position or if she is considered to have been demoted upon her return to employment, the petitioner is to be considered permanent in her title of Technical Assistant 3 and no longer PAQ. In this regard, the Board finds the petitioner to be eligible for the title. Further, in light of the fact she has been working in the title since March 6, 2004, no further period of probation is required. *See N.J.A.C. 4A:4-7.8(c)*. Finally, if the petitioner chooses not to accept the Medical Records Technician position, she will remain on the regular reemployment list for Medical Records Technician until October 21, 2007.

ORDER

Therefore, it is ordered that the Department of Human Services correct Winifred Allen's leave balances to reflect a sick leave balance of 433 hours and vacation leave balance of 210 hours, effective March 6, 2004, with the appropriate deductions made as a result of the petitioner's usage since that time. Further, it is ordered that the Department of Human Services offer the petitioner the Medical

Records Technician position at Trenton Psychiatric Hospital pursuant to the settlement agreement reached by the parties and effect her appointment in accordance with this decision. It is also ordered that any other claims be denied.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.